



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes MND, MNSD, FF

### Introduction

This hearing was convened by way of conference call in repose to the landlord's application for a Monetary Order for damage to the unit, site or property; for an Order permitting the landlord to keep all or part of the tenants' security deposit; and to recover the filing fee from the tenants for the cost of this application.

The tenants and landlord with their witnesses attended the conference call hearing, gave sworn testimony and were given the opportunity to cross exam each other and witness on their evidence. The tenant provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. All evidence and testimony of the parties has been reviewed and are considered in this decision.

### Issue(s) to be Decided

- Is the landlord entitled to a Monetary Order for damage to the unit, site or property?
- Is the landlord entitled to keep the tenants security deposit?

### Background and Evidence

Both parties agree that this fixed term tenancy started on April 15, 2011 although the date on the tenancy agreement shows April 01, 2011. A mutual agreement to end tenancy was made between the parties and the tenancy ended on September 11, 2011. Rent for this unit was \$1,600.00 per month and was due on the first day of each month. The tenants paid a security deposit of \$750.00 on or about April 01, 2011.

The landlord testifies that she left the tenants a condition inspection form to fill in at the start of the tenancy but agrees she did not carry out this inspection with the tenants and no inspection form has been provided in evidence. At the end of the tenancy the landlord and one of the tenants attended a move out condition inspection.

The landlord testifies that the tenants caused damage to the living room hardwood flooring. The landlord states the floor was old but has been stripped, sanded and recoated prior to this tenancy. The landlord states the tenants' bird caused damage to the floor with fecal matter. The floor had to be restriped, sanded and recoated again at a cost of \$300.00.

The landlord testifies the tenants caused damage to the walls. These walls had been sanded over and the cracks and holes filled prior to the start of this tenancy. The landlord states she did give the tenants permission to repaint the walls but found they had hung many pictures with nails and screws that resulted in the walls having to be re-filled, sanded and painted again. The landlord states when the tenants repainted the walls they splashed paint onto the baseboards and these had to be sanded and varnished again.

The landlord testifies the tenants caused damage to some of the window frames by putting plastic over the windows held on with duct tape. When this was pulled off the window frames it removed the paint and the frames had to be stripped, sanded and repainted.

The landlord testifies the tenants did not leave the unit in a clean condition. The landlord states she had to pay to have the fridge and stove cleaned and the floors had to be washed as there was dog matter on the kitchen floor. The landlord testifies all the before mentioned work was completed by contractors at a cost of \$1,700.00.

The landlord seeks to keep the tenants security deposit of \$750.00 in partial satisfaction of her claim. The landlord also seeks a Monetary Order for the balance of the claim including the \$50.00 filing fee.

The tenants dispute the landlords claim. The tenant testifies that her bird was caged and there was a plastic cover over the floor under the cage which was cleaned regularly. The tenant states there is no mention of damage to the floor in the move out inspection.

The tenant agrees that they did hang pictures on the walls but states they used picture hooks and small nails. The tenant states they offered to return to the unit and fill the small holes but state the landlord said it would not be necessary as she was re-painting. The tenant also states the landlord never informed them of her preference of which hooks to use to hang pictures.

The tenant disputes the landlords claim that the landlord had painted the unit after they moved out and states the walls they painted during the tenancy still remain the same colours.

The tenant states the window sills in the kitchen were already damaged when they moved in. The tenant agrees they did put plastic over the windows to prevent heat loss and states they used the proper tape that came in the pack in all areas other than one small kitchen window. With this window the tenants agree they did use duct tape. However, they state the window had many coats of paint and that is why the paint would have peeled off.

The tenant testifies that when they painted the walls they covered the baseboards with painters tape. The tenants state some of the baseboards had already been splashed with paint prior to their tenancy and in colours the tenants did not use when they painted the walls. The tenant states that the landlord has contradicted her own testimony when she said the baseboards were sanded and varnished and now the landlord has stated they were painted.

The tenants state the entire house was cleaned including the oven and fridge and all the floors were swept at the end of the tenancy. The tenants state they used professional movers who protected the floors with cardboard.

The tenants' testify that they had previously applied for the return of their security deposit and it was deemed at the hearing held on September 08, 2011 that their application was premature as the tenancy had not yet ended. The tenants testify that they now seek to recover double the security deposit as the landlord has extinguished her right to file a claim against it because she failed to do the move in condition inspection with the tenants.

The landlord calls one of her witnesses. This witness is the contractor who did work in the unit prior to this tenancy and after this tenancy ended. The witness testifies that in April, 2011 they sanded and repainted the walls, baseboards, trim and ceiling except for the kitchen. The kitchen units were cleaned along with the floors and entrance way and the kitchen window frames were re-painted. The witness states this was an older home.

The witness testifies that after the tenants moved out they were asked to go back to do work in the unit. The witness states the tenants had painted some walls purple and dark gray and these were restored to their original neutral colour. The witness states they had to clean the stove, fridge and floors and found some paint had been splashed on the floors. The witness states the tenants had used duct tape to put plastic up at the windows and on one kitchen window frame this duct tape removed the paint. The witness states there were about seven layers of paint on this frame which had to be stripped and repainted. The witness states two people worked for nearly three weeks to rectify the damage to the unit. The witness states they charged the landlord \$1,700.00 for this work.

The tenant cross examines this witness and asked if the witness was claiming to have painted the window sills and baseboards before the tenants moved in and does the witness claim the window in the kitchen had been painted properly. The witness replies she did not claim this and referred to the duct tape the tenants used on the window frame stating it was this tape that lifted the paint. The tenant asks the witness if it is correct to say if the proper paint had been used the damage would not have been done. The witness replies she did not refer to the correct paint but rather the correct tape. The tenant asks the witness about areas the witness had painted. The witness replies that they only painted areas that required painting at the start of the tenancy.

The landlord asks her witness if they repainted the back and front bedroom, the attic room and the front room. The witness replies they did paint these areas including the window frame and door frame in the front room.

The landlord was given the opportunity to call her second witness but declined as his testimony would be the same as the first witness as he was the other contractor.

The tenant calls her witness. The tenants witness states he was present with the tenants when they viewed the property on April 01, 2011 and when the tenants signed the lease. The tenant asked her witness to describe the condition of the unit. The witness replies that the unit was quite dirty, with things missing, stuff all over the floor, it was a general mess. The cupboards did not look clean inside or out, there were chips on the flooring and the flooring was unclean, there was a missing light panel the linoleum was torn, there was a missing cupboard panel and the stove was greasy. The witness does not recall the conditions of the window sills. The witness also testifies that the living room had been painted but was streaky, the floors also had drill holes and a light fixture was not attached.

The witness states the tenants had professional movers to move them out of the unit and he returned the next day with the male tenant to clean the unit, the stove, empty the fridge, and take out the garbage. The witness states the floors were all swept but not mopped and there was no fecal matter on the floors from the tenants' bird or dog. The witness states these are his observations at the start of the tenancy when he viewed the unit with the tenants and at the end of the tenancy.

The landlord cross examines this witness and asks if the witness recalls shelving on the floor and does the witness remember the condition of the bedroom floors or baseboards. The witness replies he does not recall but does remember that the only floor in good condition was the bathroom floor.

The landlord testifies that the unit was in this condition when this witness viewed the property because her contractors were still working in the unit from April 01, to April 15, 2011. The landlord states the tenants did not provide their forwarding address in writing.

The tenant disputes this and states the landlord gave them the keys and they were able to enter the unit from April 07, 2011 to start painting the unit themselves. The tenant testifies that they did give their forwarding address by telephone to the landlord and it was determined at the previous hearing held in September that this address was their forwarding address as the landlord used this address to send the tenants the hearing documents for this hearing.

Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties and witnesses. Section 23 of the Act states in part that the landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day. The landlord must complete a condition inspection report in accordance with the regulations. Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.

The landlord agrees that she did not complete the move in condition inspection with the tenants at the start of the tenancy. Therefore, pursuant to s. 38(5) and 38(6) of the Act, the right of a landlord to retain all or part of a security deposit in relation to damage has been extinguished under section 24 (2) *[landlord failure to meet start of tenancy condition report requirements]*.

I further find the tenants gave the landlord their forwarding address at the previous hearing as this is the address the landlord used when serving the tenants with these hearing documents.

Consequently, I find the landlord's application to keep the tenants security deposit for damage to the rental unit is dismissed. As the landlord's right to file a claim, to keep all or part of the security deposit has been extinguished the tenants are therefore entitled to recover double their security deposit from the landlord to the sum of **\$1,500.00**.

With regard to the landlords claim for damages to the rental unit; the purpose of having both parties participate in a move in condition inspection is to provide some objective evidence of the condition of the rental unit at the beginning of the tenancy so that the Parties can determine what damages were caused during the tenancy. In the absence of a condition inspection report, other evidence may be adduced but is not likely to carry the same evidentiary weight especially if it is disputed.

In this matter the landlord is claiming the tenants caused damage to the rental unit and the tenants' dispute this. The landlord has provided a witness to give testimony as to the condition of the unit at the start and end of the tenancy, and the tenant has provided a witness to give testimony as to the condition of the unit on April 01, 2011 and at the end of the tenancy.

Consequently, I have applied a test used for damage or loss claims to determine if the claimant has met the burden of proof in this matter:

- Proof that the damage or loss exists
- Proof that this damage or loss happened solely because of the actions or neglect of the respondent in violation of the Act or agreement
- Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
- Proof that the claimant followed S. 7(2) of the Act by taking steps to mitigate or minimize the loss or damage.

In this instance the burden of proof is on the claimant to prove the existence of the damage or loss and that it stemmed directly from a violation of the agreement or contravention of the Act on the part of the respondent. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. Finally it must be proven that the claimant did everything possible to address the situation and to mitigate the damage or losses that were incurred.

Having reviewed the evidence provided by the landlord I find the landlord has presented no corroborating evidence to meet the components of the above test. The landlord did not do the move in inspection, the landlord has not verified that the damage exists, the landlord has provided no photographic evidence of the alleged damage, the landlord has provided no verification that the tenants actions or neglect caused damage to the unit and the landlord has provided no receipt for any work carried out in the unit. The landlord's witness's statement has also been contradicted by the tenants and the landlord has not provided any

further corroborating evidence. Therefore, it is my decision that the landlord has failed to meet the burden of proof in this matter and the landlord's application is dismissed.

As the landlord has been unsuccessful with this claim the landlord must bear the cost of filing this application.

Conclusion

I HEREBY ORDER the landlord to return double the security deposit to the tenants. A Monetary Order has been issued to the tenants to the sum of **\$1,500.00** pursuant to s. 38(6)(b) of the Act.

The order must be served on the landlord and is enforceable through the Provincial Court as an order of that Court.

The landlord's application is dismissed without leave to reapply.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: December 12, 2011.

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Residential Tenancy Branch